Putting the Horse Before Descartes

Food Animals as Beneficiaries of Competition and Consumer Policy?

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What is this chat about?

1. How competition and consumer policy has suddenly assumed a role in advancing animal welfare?

2. The legal regulatory and legal implications of this role?
Yes, but what is this chat really about?

- The dimension of domestic meat consumption;
- Future world-wide trends of meat consumption;
- How Australian primary industry intends profiting from these trends;
- The scale of corporate domination (industry concentration);
- The privileging of profit over welfare.
The Commonwealth *Labelling Logic Report*;
The role of the *Australian Consumer Law* ("ACL");
The practical application of the ACL to food animal welfare;
The role of the *Australian Competition and Consumer Commission* ("the ACCC");
The difficult issue of "in trade or commerce" for strategic enforcement action under the ACL.
Australians love eating meat

- Australians consume a significant amount of meat:
  - Australian Bureau of Statistics’: September 2012 quarter - total red meat production in Australia increased by 1% to 766 000 tonnes compared with the previous quarter while chicken meat production for the same quarter increased to 264 000 tonnes;
  - 152 million animals (cattle, calves, sheep, lams, pigs and chickens) slaughtered to provide food for people. 141.7 million of these animals were chickens.
Australian Egg Corporation figures indicate 392 million dozen eggs were produced during 2011 or 12.9 million eggs each day. This represents an increase of 51% since 2000.

- Cage egg retail sales = 71 million dozen (increase of 2% on 5 years average);
- Free range retail sales = 43 million dozen (increase of 64% on the 5-year average);
- Barn-laid retail egg sales = 11 million dozen, (increase of 64% on the 5-year average)
NATIONAL LAMBNESIA TEST
HOW UNAUSTRALIAN ARE YOU?

TAKE THE TEST AT LAMBNESIA.COM.AU
Meat & Livestock Association Campaign
Sam Neill & ‘Dennis’
By 2050, the United Nations Population Division predicts that the world's population will reach somewhere between 8 - 11 billion people.

Much of this population growth will occur in developing countries where a growing middle class, with more disposable income is expected to generate substantial demand for meat products as part of their diet. This is particularly so in China and India where demand for meat products is quickly growing.
Future Consumption Problems

In order to meet this expected demand, the United Nations Food and Agricultural Organisation estimates that agricultural output will need to increase by 70%;

BUT must do so in circumstances of a world-wide decline in agricultural land because of climate change, dwindling fossil fuel supplies and the general movement of people off the land and into cities, urban and sub-urban areas.
The National Farmers Federation has specifically noted the strategic advantages available to Australian meat and grain producers in satisfying future demand from developing countries. In its *NFF Farm Facts: 2012* Report, the NFF observes:

The prospects for agriculture are huge, with the need to feed, clothe and house a booming world population. Expanding Asian societies need food and fibre like never before. The challenge for Australian agriculture and our farmers will be in meeting this booming need for food and fibre through increasing production. Agriculture has an enormous uptake of new technology.
Most suggestions for meeting these challenges involve increasing the output of Concentrated Animal Feedlot Operations ("CAFOs") through more efficient breeding and production techniques rather than advocating plant-based diets or even artificially grown meat products.

In these circumstances, the challenge for most Western countries will be to increase the efficiency of existing CAFO's in order to produce sufficient meat products for domestic consumption and emerging foreign demand for meat products.
Efficient Exploitation is the Key!

- Australia, North America and other Western countries are therefore proposing to meet the expected increase in world demand for food animal products generally, and meat products particularly, by increasing the efficiency and productivity of agricultural practices generally and CAFOs specifically particularly through technology.

- In the process, attention is being drawn to the suffering that food animals inevitably experience as a result of the growth in corporate exploitation of more efficient and productive intensive animal husbandry practices. And the role of corporations in the pursuit of profits through efficiency is central to this enterprise.
Most farmed animals in Australia are confined in CAFOs described as:

... a system of raising animals using intensive production line methods that maximise the amount of meat produced while minimising costs. Industrial animal agriculture is characterised by high stocking densities and/or close confinement, forced growth rates, high mechanisation and low labour requirements.
Most of the animal meat produced in Australia for both domestic consumption and export is processed by a few dominant corporations. The Australian chicken meat industry is a virtual duopoly. The two largest (companies) Baiada Poultry and Inghams Enterprises, supply more than 80 per cent of Australia's chicken meat.

The beef industry is dominated by four producers. Swift Australia, Cargill Australia, Teys Brothers and Nippon Meats supply almost 50% of meat products in Australia. And in 2011, the ACCC cleared a proposed acquisition of Teys Brothers by Cargill Beef Australia; an acquisition that permitted the merger of Australia’s second and fourth largest beef processors leading to a further concentration of corporate production of animal food products.
These industries are made possible in Australia by a legal system that characterises sentient, feeling animals as property without enforceable rights, and non-sentient corporations as legal persons with rights to own and exploit property. Section 124(1) of the Corporations Act 2001 (Cth) provides that corporations have the legal capacity and powers of an individual and of a body corporate, including the power to own property.

In this process, the primary responsibility of corporation is to shareholders, manifesting as duties to trade profitably.
Both common law and statute characterise animals as property;

Classifying animals as property relegates them to the status of an instrumentality."
According to this instrumentalist perspective, those animals useful to humans as companions are offered some measure of protection against ‘unnecessary’ suffering while the majority of animals are offered little or no protection against cruelty.
The exploitation of animals as property in this way is simply a reflection of the Western legal framework; ‘human beings do not treat animals harshly because they are classified as property; animals are classified as property so that human beings can legally treat them harshly’
This dissonant attitude has resulted in a legal and regulatory framework that attempts to achieve contradictory aims. On the one hand, Commonwealth, State and Territory governments attempt to protect some classes of animals from cruelty while simultaneously encouraging primary industries to profit from the economic exploitation of animals to satisfy the food preferences of humans.
In these circumstances, the welfare of animals exploited by corporations is a relative consideration necessarily balanced against the imperative of the profit motive;

In his text *Diet For a New America*, John Robbins quotes livestock auctioneer Henry Pace:

We’re no different from any other business. These animal rights people like to accuse us of mistreating our stock, but we believe we can be most efficient by not being emotional. We are a business, not a humane society, and our job is to sell merchandise at a profit. It’s no different from selling paper-clips, or refrigerators.
Rene Descartes
“A Bloody Business”

FOUR CORNERS
Investigative TV journalism at its best

A BLOODY BUSINESS
An explosive expose of the cruelty inflicted on Australian cattle exported to the slaughterhouses of Indonesia.
Legalized Cruelty: Commonwealth Model Codes of Practice.

- Commonwealth Model Codes of Practice (‘MCOPs’) relating to beef cattle, poultry and pigs permits the industrial processing of animals for human consumption;
- MCOPs initially issued by the Primary Industries Ministerial Council (‘PIMC’) and since September 2011, the Standing Committee on Primary Industries (‘SCoPI’) whose stated objective is ‘to develop and promote sustainable, innovative and profitable agriculture, fisheries / aquaculture and food and forestry industries’.
Commonwealth Model Code of Practice for the Welfare of Animals – Domestic Poultry (4th Ed) (‘MCOP - Poultry’) was issued by the PIMC in 2002. It is 'intended to help people involved in the care and management of poultry to adopt standards of husbandry that are acceptable'
MCOP Poultry – “Acceptable” Standards of Husbandry

- Killing unwanted chicks;
- Beak trimming;
- Toe removal;
- Stocking density - eggs; 500 sq cm. A4 sheet = 625 sq cm;
- Stocking density - meat; 1500 birds per hectare;
- Artificial manipulation of light;
- Use of antibiotics;
- Mass harvesting.
Labelling Logic Report

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Per 1/2 package (85 g) / pour 1/2 emballage / 1/2 package prepared / 1/2 emballa...
Recently concluded Commonwealth government review into food product labelling in Australia;

In January 2011, the gracelessly titled ‘Legislative and Government Forum on Food Regulation (Convening as the Australia and New Zealand Food Regulation Ministerial Council)’ released its Labelling Logic Report making certain recommendations about future regulatory initiatives concerning product labelling.
The Labelling Logic Report recommended what it called ‘consumer values issues’; that is consumer concerns associated with food animal welfare and religious practices associated with food animal products, to be regulated through the mechanisms in the Competition and Consumer Act 2010 (Cth) but particularly the new ACL.
In its December 2011 Response to the *Labelling Logic Report*, the Commonwealth affirmed this approach; that consumer value issues (such as animal welfare and religious issues) associated with food animal products were best regulated through the mechanisms in the *Competition and Consumer Act 2010* (Cth).
How is it intended to Work?

Instead of simply legislating to prohibit certain animal farming practices, or to regulate the religious slaughter of animals, the Commonwealth intends market forces in the form of consumer demand exerting upstream market pressure on primary industry producers to implement food animal welfare initiatives.
How is it intended to Work?

In an increasingly competitive market for food products, it is anticipated that consumer demand for ethically produced animal products will signal producers to implement food animal welfare practices such as free-range farms;

In attempting to satisfy this consumer demand, food animal products accentuating animal welfare will be subject to careful scrutiny under the misleading or deceptive conduct provisions of the ACL. Product differentiation based on food animal welfare claims requires careful substantiation.
Practical Application: What is Said.

This is the only time a Steggles chicken is kept in a confined space. We have no cages, just big barns.

Steggles is steiglers for quality.
Practical Application: The Reality
Practical Application: The Reality

THE NEED FOR TRUTH IN LABELLING explained...

- Sorta Free but not Cagey
- Unhappy Chooks
- Almost Free
- "Free"
- Buy Me
Australian Egg Corporation (‘the AEC’) proposed new *Draft Egg Standards* (‘the AEC Draft Standards’) would permit the label ‘free range’ to be applied to eggs produced by farms that permit a stocking density of up to 20 000 chickens per hectare;

The AEC *Draft Standards* would permit a stocking density of only 0.5 of a metre for each chicken, representing a 91.6% reduction in available space while legally advertising that eggs produced in these conditions are free-range!
In March 2011, ACCC received AEC’s application for certification of trademark (“CTM”) based on its Draft Standards;

ACCC received over 1700 public submissions. All but 7 submissions opposed the application;

ACCC denied application stating:

It was “not satisfied that the Rules are satisfactory having regard to relevant principles relating to unfair practices, because it is concerned that the Rules may mislead or deceive consumers regarding the nature of a certified egg production process described as ‘free range’”.

Australian Egg Corp’s Ambit Claim
Role of the ACCC

Australian Competition and Consumer Commission v C.I. & Co Pty Ltd [2010] FCA 1511 (23 December 2010);

Australian Competition and Consumer Commission v Turi Foods Pty Ltd (No 2) [1012] FCA 19 (2 December 2011);

“Rosie’s Free Range Eggs” – Instituted 8 March 2012;

“Pepe’s Ducks Ltd – Orders made December 2012.
What Created the ACL?

1. *Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010 (Cth)* ("the Amendment Act")

2. The *Amendment Act* contains 6 Schedules;

3. Schedule 1 of the *Amendment Act* contains the text of the ACL;
Where is the ACL?

- *Amendment Act* creates Schedule 2 of the *Competition and Consumer Act 2010* (Cth) (“the CCA”)

- Part XI of the CCA applies the text of the ACL (found in Schedule 2) as a law of the Commonwealth;

- Part XIAA of the CCA creates “Applied Australian Consumer Law” to be implemented by States and Territories.
Misleading and Deceptive Conduct:

Part V, Div 1, TPA – s 52 / ACL Chapter 2, Part 2-1, s 18:

“s 18(1): A person must not, in trade or commerce engage in conduct that is misleading or deceptive or likely to mislead or deceive.”
Western Australian based family owned company, C.I & Co Pty Ltd (‘CI’) acquired eggs from egg farms and supplied them to a number of retailers, cafes and restaurants.

Between June 2008 and April 2010, CI acquired over a million dozen eggs produced by battery cage hens and 12 000 dozen free-range eggs. However, in that period, CI supplied nearly 900 000 dozen eggs to customers that it had labelled ‘free range’, conduct described by the Court as involving ‘a high level of dishonesty’.
CI and directors earned a significant amount of revenue they would not otherwise have earned if the eggs had been truthfully labelled as ‘cage eggs’.

The Court noted that in a two-week period between 15 and 30 April 2010, CI and its directors earned between $5744 and $9008 in revenue ‘which they would not have derived had the eggs been labelled clearly as ‘cage eggs’.’
The Court clearly explained the relationship between the misleading labelling and consumer interest in food animal welfare.

According to the Court, the misleading labels ‘amounted to a cruel deception on consumers who mostly seek out free range eggs as a matter of principle, hoping to advance the cause of animal welfare by so doing.’
Also still before the Court are proceedings commenced in September 2011 by the ACCC against Turi Foods Pty Ltd, Baiada Poultry Pty Ltd, Bartter Enterprises Pty Limited and the Australian Chicken Meat Federation Inc (‘the ACMF’);

Baiada Poultry and Bartter Enterprises supply chickens throughout Australia under the well-known ‘Steggles’ brand name while Turi Foods supplies ‘La Ionica’ brand chickens in New South Wales and Victoria.
The ACCC alleges that ‘Baiada Poultry and Bartter Enterprises made false or misleading claims in print advertising and product packaging, that Steggles meat chickens are raised in barns with substantial space available allowing them to roam freely’ when this was not the case at all’
The actual evidence indicated that the average space available to each chicken was about 500 square centimetres;

Despite the mathematical bleakness of the evidence, the ACMF claimed that there were simply no grounds for alleging that chickens were not ‘free to roam’ as they had represented. Perhaps not surprisingly, Tracey J refused to strike out the ACCC’s action, observing that ‘five hundred centimetres squared is a remarkably small space. In order for any one chicken to have a larger area of movement, others would have to be confined within an even smaller space.'
By January 2012, Turi Foods Pty Ltd admitted the contraventions and submitting to consent orders. After reviewing the evidence, Tracey J concluded:

“the stock densities, which La Ionica has admitted are to be found in the barns in which its chickens are raised, are maintained at such a level that the chickens have severe restrictions placed on their capacity to roam, if, indeed any such capacity exists”.
Both Baiada Poultry and Bartter Enterprises owned and operated chicken growing sheds in the same way as Turi Foods, including equivalent stocking densities;

In February 2012 Baiada Poultry Pty Ltd and Bartter Enterprises attempted to have Tracey J disqualify himself from hearing the case on the grounds of apprehended bias;
They alleged that Tracey J’s conclusion about stocking densities made in concluding the proceedings against Turi Foods ‘travelled beyond the agreed facts…and constituted findings independently made by (Judge).’

His Honour rejected the application and the litigation against Baiada Poultry & Ors continues.
“In Trade or Commerce”? 

- Statements made by industry representative corporations (AEC, MLA or APL) and animal NGOs (RSPCA, PETA, Voiceless) in the form of public debate;

- Statements made outside of direct advertising campaigns but intended to influence consumer’s buying patterns.
“In Trade or Commerce”? 

Eg – Australian Pork Limited Media Release dated 19 December 2012: “Australia’s Pork Industry Leading the World on Sow Stall Free”;

Also states: “Anyone who supports better welfare for sows could do no better than to buy Australian ham and bacon, supporting Aussie pig framers over imports.”
APL’s own definition of “Gestation Stall Free” has been defined as:

“Sows and gilts should be kept in loose housing from five days after service until one week before farrowing...In loose (group) housing, sow and gilts – either singularly or in groups - have freedom of movement i.e. they can turn around and extend their limbs. The housing of one or more animals must meet the Model Code for the Welfare of Pigs (2007) space allowance requirements. Where a pen is used to confine a pig individually during gestation (up to 1 week prior to farrowing), it must meet the definition of loose housing.”
Motivation for Litigation under the ACL?

- Uniform Defamation Laws preventing corporations from instituting defamation proceedings – eg s 9 of the *Defamation Act 2005* (NSW);

- SLAPP Suits (Strategic Litigation Against Public Participation) to short-circuit NGO legal proceedings concerning animal welfare issues?

- *Civil Dispute Resolution Act 2011* (Cth) – in Federal Jurisdiction?
“In Trade or Commerce” - Principal Authorities

Two principal authorities:
First - Concrete Constructions (NSW) Pty Ltd v Nelson (1990) 169 CLR 594. Conduct is “in trade or commerce” when:

“activities or transactions which, of their nature, bear a trading or commercial character” (CLR 604). To 'conduct which is itself an aspect or element of activities or transactions which, of their nature, bear a trading or commercial character.’” (CLR 603).

“Statements made by a person not himself or herself engaged in trade or commerce may answer the statutory expression if, for example, they are designed to encourage others to invest, or to continue investments, in a particular trading entity.” (CLR 565).
For example reconcile:

- Firewatch Australia Pty Ltd v Country Fire Authority (1999) ATPR (Digest) 46-198 – Internal communication in trade or commerce; with

- Dataflow Computer Services Pty Ltd v Goodman (1999) ATPR 41-730 – E-mail intended to influence business not in trade or commerce.
Indicates a potentially expansive approach to “in trade or commerce”. If so, and in the context of public debate, need to draw a distinction between:

1. Corporation or NGO seeking to influence public opinion about political, ethical or economic issues where the corporation or NGO does not have a commercial or financial interest in the public adopting a particular conclusion – *Village Building Company Limited v Canberra International Airport Pty Ltd* (2004) ATPR 42-019
2. Corporation or NGO seeking to influence public opinion about political, ethical or economic issues where the corporation or NGO hopes to achieve some financial or commercial gain or influence the trade or another -

(a) TCN Channel Nine Pty Ltd v Ilvariy Pty Ltd (2008) 71 NSWLR 323 – Reporter for “A Current Affair” program falsely represented himself as a customer in order to enter plaintiff’s premises. Conduct “in trade or commerce”
Implications of Arms

(b) *Seafolly Pty Ltd v Madden* (2012) ATPR 42-424 – Passive-aggressive comments on Facebook page falsely alleging passing off of swimsuit designs held to be “in trade or commerce” because they were intended to harm the trading reputation of Seafolly.
Conclusions?

As a result of the *Arms* decision, would cases like *Orion Pet Products Pty Ltd v RSPCA (Vic) Inc* (2002) ATPR 46-223 (pre-*Arms*) be decided the same way?

Although representations about the alleged cruelty of the electronic dog collars were not intended to generate economic benefit for the RSPCA, they were clearly intended to persuade customers to stop buying them from Orion Pet Products.
The effective and strategic use of the ACL can support limited legislative, enforcement and consumer initiatives in favour of food animal welfare and in doing so, it has the potential to by-pass several difficult philosophical and regulatory problems associated with food animal welfare reform.
For regulators like the Australian Competition and Consumer Commission, the ACL generally and labelling specific consumer legislation will provide a more coherent basis for strategic legal and enforcement initiatives than action based on alleged breaches of inchoate ‘animal rights’.
And accuracy in product labelling will provide consumers with sufficient information about animal-derived food products enabling them to make choices that reflect their personal values, particularly for those consumers who 'seek out free range eggs as a matter of principle, hoping to advance the cause of animal welfare by so doing'.
Recourse to the ACL or to labelling specific consumer legislation does not absolve western societies of the larger imperative to develop a coherent philosophy of animal welfare that commands general acceptance;

However, until such a philosophy has been created and accepted, consumer demand, protected by the ACL and underwritten by strategic enforcement through the ACCC, has the potential to permit partial advances in food animal welfare.
Consumers become aware of animal exploitation and suffering only by gaining knowledge of the legal and regulatory framework that permit the cruel conditions in which animals are exploited for human desires. Hard knowledge generates thoughtful awareness. In turn, awareness of this suffering engenders empathy, a quality that is inconsistent with cruelty but consistent with kindness.
Thank You!